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No. 84-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GETTY OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY, *et al.*,

AND

UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

WILLIAM E. WICKENS
SURREY & MORSE
1250 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-4000
Attorney for Getty Oil Company

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Getty Oil Company's parent company and its non-wholly-owned subsidiaries and affiliates have been listed in the Petition for a Writ of Certiorari at ii.

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Nowhere does Respondents' untimely[1] memorandum deny the numerous conflicts with other circuits that TECA created by its decision below. Nowhere does it deny that TECA has embarked upon a course which is at odds with the rulings of this Court and the other circuits. Indeed, TECA is more at odds with the other circuits than is the Ninth Circuit, which has received considerable scrutiny

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[1] Although having been granted two extensions of time, Respondents' six-page memorandum was not filed within time, nor was any further leave sought or granted.

by this Court. TECA, far from ending its work, has a large docket extending indefinitely.[2] Its activities should not, therefore, continue unreviewed.

When Congress passed the Department of Energy Organization Act in 1977, it expressed the gravest concern about the lack of due process at the agency.[3] This case, like many others, arose prior to that time. Yet this Court has never reviewed what the agency has done either to private parties or to the principles of Constitutional or administrative law.

Instead of addressing these issues, or the legal principles behind them, the Respondents' memorandum is based upon demonstrable misstatements of fact:

1. Respondent at page 4 seeks to avoid the issue of the denial of due process by asserting that Getty "withdrew" its request for a hearing before the Department of Energy. The transcript discloses, however, that Getty waived nothing more than a hearing on certain collateral issues.[4] Getty expressly reserved its right to a hearing

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[2] *See* N.Y. Times, November 5, 1984, at B10, col. 4.

[3] Senator Jacob Javits, the author and Senate sponsor of the bill ultimately approved, stated that the agency's procedures fall "short of the due process safeguards and separation of functions requirements included in all other permanent regulatory schemes." 123 Cong. Rec. 15281 (1977). Representative Bob Eckhardt, the House sponsor, voiced the concern that under the Administration's minimal procedures, there was no way that "a person ordered to comply with a rule or regulation by a remedial order could get a hearing before the agency." *Id.* at 17402.

[4] Mr. C.J. Head, counsel for Getty, stated:

> [I]ndependent of the factual hearing or evidentiary hearing that we believe ought to be held we do intend to submit some updating of material. For instance, our appeal was filed in October. There have been developments that I think you should be privy to, just to have a current record. For example, the merger of Skelly Oil into Getty Oil somewhat changes some of the factual things that we presented as a part of our appeal. But those can be done by affidavit. Similarly, there were some

on issues of material fact as to which there was, and as to which there remains, a genuine dispute.[5]

2. Respondents, also at page 4, surprisingly claim that Getty was unable to point to any disputed issues of fact before the DOE, the District Court, or TECA. That is untrue as to all three. Before the agency, Getty designated numerous disputed issues of fact, including Sohio's intent, prices, volumes, and accounting practices. Getty's attempts to obtain discovery and a hearing as to these and other disputed issues were summarized for this Court at Petitioner's Appendix I. In the District Court, Getty raised those same issues. (District Court Brief at pp. 164-66.) Before TECA they were raised yet again. (TECA Brief at p. 7 and Appendix C thereto.) In light of this, it is astonishing that the Court would be told that no such issues had ever been raised.

3. Respondents state at page 4, note 5 of their memorandum that "[t]he district court found that there were no material omissions from the administrative record, so that the Department's decision was not affected by extra-record evidence." Respondents are engaging in sleight of hand. The District Court's conclusion that the remaining gaps in the administrative record were not material was made *after* the DOE had supplemented the District Court record with twenty-two documents (listed in Petitioner's Appendix H) that had been kept *secret* from Getty at the agency level. Thus, the District Court's

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> things that are in the Sohio affidavits that we dispute and I directed my letter of December 17, 1976 to that issue and said that we wish to defer that and assumed that that was acceptable. We would like to file a short statement on a couple of points in their affidavit. But that again is written and we don't need a hearing on those things.

(*See* TECA brief at 12a, quoting transcript of conference convened by the Office of Hearings and Appeals on April 19, 1977.)

[5] Getty sought such a hearing on at least six different occasions. (*See* Pet. App. I.)

findings do not in any way negate the fact that the agency relied upon secret *ex parte* material.

4. With respect to the 15-month extension of liability without notice to Getty, Respondents state at page 6, note 7 that the notice of violation was open-ended between October 1973 and the current time. That statement misleads this Court as well. The alleged price violation charged by the DOE ended in October 1974. What was alleged for the subsequent period was an entitlements violation (Pet. at 7), which is factually and legally entirely different. Thus, Getty had no knowledge that it was charged with any price violation for any period after October 1974 (thereby doubling its liability) until its opportunity to respond had expired. It was quite wrong for the Respondents to have suggested otherwise.

5. With respect to prejudgment interest, Respondents assert at page 5 that the DOE order and the District Court order were "restitutionary". In fact neither provided for any payment to overcharged parties, but instead to the U.S. Treasury.

6. As to the retroactive application of yet-to-be-developed rules, Respondents state at page 2 that the effect of "the agreement" was a "barrel-for-barrel exchange . . . with a cash differential paid to petitioner." There was in fact not "an" agreement, but three separate agreements. Each sale was separately billed and paid for in full and no "cash differential" was ever paid. (Pet. at 3-4.) Neither TECA nor the District Court accepted the DOE's conclusion that the transactions were an exchange.

7. Respondents at page 2 make the misleading statement that "it is undisputed that [Getty] sold the foreign oil . . . received from Sohio . . . for a price that far exceeded the amount that lawfully could have been charged for that domestic oil." The prices at which Getty resold the foreign oil in Japan during 1974, 1975, and 1976 are not part of the record. Those transactions are not even

the ones as to which Getty has been charged with any violation.[6] Nor was that oil, which never entered the United States, ever subject to the DOE's jurisdiction.

8. Respondents maintain at page 4, note 4 that Sohio's intent is irrelevant to the determination of the nature of the agreements with Getty. Yet, in its Opposition Brief to the District Court, DOE admitted that consideration "depends upon the intent of the parties", thus acknowledging that Sohio's intent was indeed relevant. (Pet. at 22.) The District Court erred, however, in holding, perhaps for the first time anywhere, that intent is not relevant to what constitutes consideration.

9. Respondents at pages 5-6 deny that DOE retroactively applied an exchange rule that it would not formally adopt until 1978. In fact, DOE applied the provisions of this rule in everything but name. As recounted in Appendix G to the Petition, DOE personnel recognized on numerous occasions that Getty had not violated any existing regulation, and that new regulations would be needed if transactions such as those between Getty and Sohio were to be barred in the future. The appropriate rulemaking did not in fact occur until 1978. Yet, the Decision and Order in this case applied the very substance of the yet to be adopted rule in treating matching purchases and sales not as sales, but instead as exchanges.

With respect to prejudgment interest, Respondents rely at page 5 on § 205.195(a) of DOE's regulations and at note 6, also on page 5, on DOE's statutory authority. Yet, the statutes make no provision for prejudgment interest and the only regulation providing for it was adopted in violation of applicable rulemaking requirements. Respondents make no claim otherwise. It is hardly the law that invalid regulations are somehow cured by underlying statutes.

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[6] Getty was charged with a violation on its sale of domestic crude on the theory that the value of the foreign oil purchased became part of the price of the domestic oil sold by Getty.

Nor do Respondents dispute that evidence which could not be tested cannot, as a matter of law, be substantial for purposes of substantial evidence review.

Most critically, Respondents fail to rebut any of Getty's arguments concerning the denial of due process of law. Respondents at page 4, note 5 mischaracterize these arguments as being based on the Administrative Procedure Act, and blithely maintain that the DOE is exempt from "most of the requirements" of the Act.[7] Respondents' statements serve only to divert this Court's attention from the true issue at hand. This is not an Administrative Procedure Act case. Rather, it is a case that raises the fundamental principles of due process applicable to all Americans, whether or not they find themselves before an administrative agency. Getty's liability has been predicated on secret evidence, in a proceeding which permitted Getty neither discovery nor cross-examination, and which was governed by only minimal rules of procedure. There were no rules of evidence. There was no independent finder of fact. Getty not only bore the burden of proving that it had not violated any applicable regulation, it also was presented with a change in the DOE's theory of liability once Getty's opportunity to respond had expired. The due process considerations raised by such practices cannot be explained away by the irrelevant contention that DOE is exempt from portions of the Administrative Procedure Act. Nor should those due process issues go unreviewed by this Court.

As made clear recently in the New York Times, there is little that is "temporary" about the Temporary Emergency Court of Appeals. TECA has been in existence for thirteen years. In addition to the thirty-nine cases now on TECA's docket, 710 cases, involving billions of dollars, remain before the DOE's Office of Hearings and Ap-

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[7] Getty has argued only that the DOE is subject to Section 552(a)(1)(C) of the Act, a fact which is indisputable. (*See* Pet. at 13, note 6.)

peals.[8] Many, if not most, of these cases will eventually come before TECA. Under such circumstances, it is imperative that this Court subject the decisions of TECA to the same level of scrutiny accorded other circuits. The alternative is a proliferation of the conflicts with other circuits caused by TECA's decisions, and the further erosion of fundamental notions of fairness and due process that TECA's decision in the present case represents.

Respectfully submitted,

WILLIAM E. WICKENS
SURREY & MORSE
1250 Eye Street, N.W.
Washington, D.C. 20005
Attorney for Getty Oil Company

February 4, 1985

[8] New York Times, *supra* note 2.